# *LECTURE*

## WHAT'S REALLY WRONG WITH THE SUPREME COURT—AND WHY AND HOW WE SHOULD FIX IT

STEPHEN I. VLADECK*

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* Agnes Williams Sesquicentennial Professor of Federal Courts, Georgetown University Law Center. This Essay is an edited version of the James Goold Cutler Lecture, delivered at William & Mary Law School on February 4, 2026. I am grateful to Dean Benjamin Spencer and Professor Evan Criddle for the invitation to deliver the Cutler Lecture, to Ricky Coyne, Grace Kiple, Ava Singh, and Mackenzie Webb for exceptional research assistance, and to Alston Harwood, Laura Laswell, Grace Melick, and their colleagues on the *William & Mary Law Review* for bringing this piece to fruition.

## INTRODUCTION

> "My colleagues and I want to be the most trusted people in American life. How do you instill that trust? Over time you build up a deposit, a reservoir, a storehouse of trust. And when we make a difficult decision in many areas ... you draw down on that capital of trust."[1]

When Richard Nixon resigned the presidency on August 9, 1974, it was because of the United States Supreme Court.[2] Sixteen days earlier, on July 24, the Justices had unanimously ordered Nixon to comply with a subpoena from Leon Jaworski, the Watergate Special Prosecutor, and release the remaining tapes made by Nixon's secret Oval Office recording system.[3] Nixon had urged the Supreme Court to hold that the tapes were shielded by "executive privilege."[4] Although Chief Justice Warren Burger's formal opinion for the Court agreed with Nixon that Article II of the Constitution implicitly enshrines such a concept, it concluded that Jaworski's need for the tapes overrode Nixon's interest in their continuing confidentiality and insisted on their disclosure.[5]

On one of those tapes, Nixon could be heard instructing his then-Chief of Staff, H.R. Haldeman, to shut down any investigation into the Watergate break-in by having the CIA falsely invoke "national security."[6] That recording, which became known as the "smoking gun" tape, was widely viewed as proof that Nixon knew that the burglars were connected to his 1972 reelection campaign.[7] Worse, it appeared to prove that the President of the United States was

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1. *Dep'ts of Com., Just., and State, the Judiciary, and Related Agencies Appropriations for 2002: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 107th Cong. 27 (2002) (statement of Hon. Anthony M. Kennedy, Sup. Ct. of the U.S.), https://www.govinfo.gov/content/pkg/CHRG-107hhrg77310/pdf/CHRG-107hhrg77310.pdf [https://perma.cc/YPP3-N2XP].

2. *See* Michael J. Gerhardt, *Presidential Defiance and the Courts*, 12 HARV. L. & POL'Y REV. 67, 80 (2018).

3. *See* United States v. Nixon, 418 U.S. 683, 715-16 (1974).

4. *Id.* at 686.

5. *See id.* at 708-13.

6. *See* BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 266-67 (1976).

7. *See id.* at 269-70.

directly responsible for (and directly involved in) the efforts to orchestrate a cover-up.[8]

Within hours of the smoking gun tape's release on August 5, Nixon's remaining support among Republicans in (and outside of) Congress evaporated.[9] To be sure, Nixon's impeachment by the House of Representatives had already appeared to be a *fait accompli*; three separate articles of impeachment had already been voted out of the House Judiciary Committee by wide margins.[10] But Nixon had bet his presidency on the math of the Senate—where, rather than the simple majority required for impeachment by the House, the Constitution requires a two-thirds vote for conviction.[11] In August 1974, that meant that Nixon could only be convicted if at least nine Republican senators voted against him.[12]

Before the Court-ordered release of the smoking gun tape, the math appeared to be in Nixon's favor; afterward, as Arizona Senator Barry Goldwater and two other senior Republicans told him in a somber White House meeting on August 7, it was not.[13] By the following evening, Nixon publicly announced that he would become the first (and, to this day, the only) president to voluntarily step down so that he would not become the first president to be involuntarily removed by the Senate.[14]

The Supreme Court's ruling had sunk Nixon. So why did he comply with it?

The answer is politics. For most of American history, a president who openly defied the Supreme Court would have been inviting immediate impeachment and removal.[15] The public took for granted that the executive branch had an obligation not just to accept the Supreme Court's decisions, but to give those decisions teeth. As

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8. *See id.* at 270.
9. *See id.* at 367-74.
10. *See id.* at 302, 327.
11. *See* U.S. CONST. art. I, § 3, cl. 6.
12. *See* WOODWARD & BERNSTEIN, *supra* note 6, at 87, 316.
13. *See id.* at 403, 405-06, 414-15.
14. *See id.* at 446-47; Gerhardt, *supra* note 2.
15. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 4 (2007) ("Those who advocate judicial supremacy, including the Court itself, tend to treat it as a matter of normative directive and accomplished fact."). *But see id.* ("American history is littered with debates over judicial authority and constitutional meaning.... [J]udicial supremacy cannot simply be assumed to exist.").

much as President Nixon may have wanted to flout the Justices' 1974 ruling ordering him to turn over the Watergate tapes, he accepted it when he became convinced that he would be removed from office if he did not.[16]

Likewise, it was not Chief Justice Earl Warren who sent the Army into Little Rock in 1957 to enforce the Supreme Court's 1954 ruling in *Brown v. Board of Education*[17] and desegregate Central High School, it was President Dwight Eisenhower.[18] Eisenhower may not have been the most zealous advocate for civil rights and desegregation, but once the Supreme Court had spoken, he viewed it as his duty to bring the full weight of the federal government to bear against local and state governments that resisted its decree.[19]

The Watergate and Little Rock episodes speak in separate but related ways to an elusive but essential dynamic when it comes to understanding what makes the Supreme Court truly "supreme": It is not the mystical belief that the institution is infallible,[20] but rather the more prosaic reality that, over time, the Court has earned—and generally enjoyed—the type of diffuse, broad support that has made the flouting of its mandates a political (not legal) non-starter. Put another way, the Court did not emerge from the 1787 Constitutional Convention with the authority that it has today; as Justice Kennedy suggested in the quote that appears as the epigraph to this Essay, it accumulated this authority over time.[21]

Some of that accumulation was because of the Justices' own behavior, but more of it was because of a healthy, ongoing dialogue between the Court and the other institutions of government over how much power unelected judges should—and should not—wield in our republic. The animating paradox of the Supreme Court in American history has been that the Court has had the power to halt

16. *See* Gerhardt, *supra* note 2.

17. *See* 347 U.S. 483, 495 (1954).

18. *See* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1938 (2008).

19. *See id.*; JAMES F. SIMON, EISENHOWER VS. WARREN: THE BATTLE FOR CIVIL RIGHTS AND LIBERTIES 293-95, 308-09 (2018).

20. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the judgment) ("We are not final because we are infallible, but we are infallible only because we are final.").

21. *See Dep'ts of Com., Just., and State, the Judiciary, and Related Agencies Appropriations for 2002: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, *supra* note 1.

actions of the democratically elected branches of government, but that its power to do so has depended, in ways big and small, on the implicit (and, sometimes, explicit) support of those very branches.[22]

As the Watergate example illustrates, that series of compromises is reflected, among other things, in the fact that the Court has the power to order presidents to comply with subpoenas but not to enforce the subpoenas itself.[23] Although the Court has a marshal and its own police force, their charge is to protect the building and the Justices, not to carry out the Court's decrees.[24] Indeed, ever since the Court first met in February 1790, its rules have made clear, as they still do today, that its mandates issue "in the name of the President of the United States."[25] Nixon faced no direct threat from the Justices if he defied them; it was the indirect political consequences that compelled him to obey.[26]

And in the other direction, the political branches possessed—and regularly exercised—their own checks over the Court. Between them, Congress and the president controlled the size and composition of the Court,[27] where the Court sat,[28] when it sat,[29] its budget,[30] the cases the Justices were allowed to decide,[31] how the Court's decisions would be disseminated to the public,[32] and what kind of staff the Justices could hire.[33] When necessary, Congress used those

22. *See* WHITTINGTON, *supra* note 15.

23. *See Executive Enforcement of Judicial Orders*, FED. JUD. CTR., https://www.fjc.gov/history/administration/executive-enforcement-judicial-orders [https://perma.cc/7DEH-5W5U].

24. *See, e.g.*, 40 U.S.C. §§ 6121-6122. *See generally* Steve Vladeck, *The Attempted Assassination of Justice Field*, ONE FIRST (Mar. 24, 2025), https://www.stevevladeck.com/p/134-the-attempted-assassination-of [https://perma.cc/X3ZA-CY7J] (summarizing the history and authority of the Supreme Court Police).

25. SUP. CT. R. 45.1. For the 1790 rule, see Rules and Orders of the Supreme Court of the United States, 5 U.S. (1 Cranch) xvii (1803).

26. *See* Gerhardt, *supra* note 2.

27. *See* 28 U.S.C. § 1.

28. *Id.* § 2.

29. *Id.*

30. *See* Steve Vladeck, *The Supreme Court's Budget*, ONE FIRST (Sep. 4, 2023), https://www.stevevladeck.com/p/43-the-supreme-courts-budget [https://perma.cc/YMH5-FZTA].

31. *See* 28 U.S.C. §§ 1251-1260.

32. *See* Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 J. SUP. CT. HIST. 9, 9-10 (2001).

33. *See* Steve Vladeck, *The Supreme Court's Four Officers*, ONE FIRST (May 27, 2024), https://www.stevevladeck.com/p/82-the-supreme-courts-four-officers [https://perma.cc/XXB6-PDFF].

powers to nudge the Court in ways both big and small—like a January 1882 statute that offered Justice Ward Hunt a pension if, but only if, he resigned within thirty days; he took the deal.[34] How much (or how little) Congress used these powers to leverage the Court was itself a function of the general regard in which the public and its elected representatives held the Court as an institution and the Justices as individuals.[35] The more popular the Court was, the more controversy surrounded any attempted legislative inroads, and vice versa.[36]

The critical point is not that the Supreme Court was not political, it is that it *was*—in an institutional sense more than a partisan one.[37] The Justices as individuals and the Court as a whole carefully cultivated their relationships with the other institutions of government and, through them, burnished their credibility with the public. The Court's power, in other words, came not from its independence as such, but from a pervasive and prevailing sense that the Court was exercising its independence responsibly—that it had been earned.[38] It was no knock on the Court to call it "political," as opposed to "partisan."[39]

The more institutionally responsive the Court was, the more independence it would have when it mattered. As Harvard Law Professor Paul Freund once put it, the Justices gained power from the perception that they "are not, [or] at any rate should not be, influenced by the weather of the day, but they are necessarily influenced by the climate of the age."[40] The Court's formal and practical power to assert itself against democratically elected officials in individual cases thus came from the crucial but elusive

34. *See* Act of Jan. 27, 1882, ch. 4, 22 Stat. 2; Britannica Editors, *Ward Hunt*, ENCYCLOPEDIA BRITANNICA (Mar. 20, 2026), https://www.britannica.com/biography/Ward-Hunt [https://perma.cc/GSD2-7J2U].

35. *See* Steve Vladeck, *The Supreme Court Has Become Too Political*, *in* WE HOLD THESE "TRUTHS": HOW TO SPOT THE MYTHS THAT ARE HOLDING AMERICA BACK 109, 119-22 (Casey Burgat ed., 2025).

36. *See id.*

37. *See, e.g.*, JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 6-8 (2012); RACHEL A. SHELDEN, THE POLITICAL SUPREME COURT: A FORGOTTEN HISTORY (forthcoming Oct. 2026) (manuscript at 9-10).

38. *See* Vladeck, *supra* note 35, at 122.

39. *Id.* at 109-11.

40. *See* Colloquy, *Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit*, 124 F.R.D. 336, 338 (1989).

extent to which the Court's broader behavior enjoyed (and promoted) widespread public approval.

Perhaps surprisingly, that support often had exceedingly little to do with the analytical force of the Court's decisions. Ever since those decisions were handed down, popular and academic commentators alike have been unsparing in their critiques of the persuasiveness of both Chief Justice Warren's opinion for the Court in *Brown*[41] and Chief Justice Burger's opinion for the Court in *Nixon*.[42] *Brown* was a surprisingly (if deliberately) short opinion that was intended to be accessible to lay readers and rested more on sociological studies than on constitutional interpretation.[43] Indeed, there is an entire collection of academic essays published under the title *What* Brown v. Board of Education *Should Have Said*.[44] And the *Nixon* ruling reflected a confused hodgepodge of legal conclusions hastily slapped together by different coalitions of Justices behind the scenes in the sixteen frantic days between the oral argument and the handing down of the decision.[45]

Rather, the weight of those rulings came from their institutional force—from a combination of their unanimity (something both Warren and Burger had labored mightily to obtain)[46] and the degree of public support the Court enjoyed when they were decided. The Court persuaded the public not so much through what it said as how it acted—both in those individual cases and in the broader times in which those cases were decided.[47] Put simply, Nixon chose to turn over the Watergate tapes, and Eisenhower chose to send the Army

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41. 347 U.S. 483, 495 (1954).

42. 418 U.S. 683, 715-16 (1974); *see* Vladeck, *supra* note 35, at 116-17.

43. *See Brown*, 347 U.S. at 493-94.

44. *See* Jack M. Balkin, *Preface*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION, at ix, ix-xi (Jack M. Balkin ed., 2001).

45. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 344-46 (1979).

46. *See* Daniel Frost, *Judicial Excellence after Earl Warren*, 101 JUDICATURE 57, 59 (2017); *The Supreme Court: A Unanimous No to Nixon*, TIME (Aug. 5, 1974), https://time.com/archive/6817113/the-supreme-court-a-unanimous-no-to-nixon/ [https://perma.cc/D77W-GS65].

47. *See* Rachel Reed, *Are Presidents 'Above the Law'? 50 Years Ago, the Supreme Court Said No*, HARV. L. TODAY (July 31, 2024), https://hls.harvard.edu/today/are-presidents-above-the-law-50-years-ago-the-supreme-court-said-no/ [https://perma.cc/9BNK-LJVL] ("[T]he fact that it was written by [Burger] and was [unanimous] was important to having the public recognize that the Court had treated the matter seriously and fairly.").

into Little Rock, because the Court in each of those moments was a lot more popular than those presidents were.[48]

## I. THE COURT WE HAVE

The Court we have today has squandered that goodwill. With a majority consistently featuring all six of the Justices appointed by Republican presidents reining in the administrative state,[49] scaling back reproductive and voting rights,[50] eliminating racial preferences in higher education,[51] and radically expanding the Constitution's protections for both religious liberty and gun ownership,[52] the past decade has seen as dramatic a shift in the constitutional center of gravity as any in the history of the United States. All the while, at least two of the six Justices in that majority—Clarence Thomas and Samuel Alito—have continued to engage in personal behavior that has raised serious questions about ethics violations, and has even spurred calls for impeachment.[53]

The same period has seen the Court hand down a steadily increasing array of nationally important rulings through unsigned, and usually unexplained, orders as part of what University of Chicago Law Professor Will Baude dubbed the "shadow docket."[54] Through these rulings, which typically come at early stages of litigation (and before the case has reached the Justices on the merits), the Justices have done everything from blocking Biden-era

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48. *See* Vladeck, *supra* note 35, at 116-17.

49. *See, e.g.*, Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2460 (2024); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); Ohio v. EPA, 144 S. Ct. 2040, 2058 (2024); SEC v. Jarkesy, 144 S. Ct. 2117, 2139 (2024); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

50. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284-85 (2022); Shelby Cnty. v. Holder, 570 U.S. 529, 556-57 (2013).

51. *See* Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2143, 2176 (2023).

52. *See, e.g.*, Mahmoud v. Taylor, 145 S. Ct. 2332, 2363-64 (2025); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432-33 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022); Carson v. Makin, 142 S. Ct. 1987, 2002 (2022).

53. *See* Austin Sarat, *Should Justices Alito and Thomas Be Impeached?*, VERDICT (July 12, 2024), https://verdict.justia.com/2024/07/12/should-justices-alito-and-thomas-be-impeached [https://perma.cc/FV3H-G4K7].

54. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 4-5 (2015); STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC, at xii (2023).

environmental regulations[55] and COVID-mitigation measures[56] to unblocking a broad array of President Trump's policies,[57] to allowing Alabama and other states to use unlawful congressional district maps in the 2022 midterm elections[58]—which helped to ensure Republican control of the House of Representatives in the 118th Congress (2023-25).[59]

As troubling as the Court's moves have been in cases for which it has provided a written opinion after multiple rounds of briefing and oral argument, its shadow docket behavior has been even worse since the Court itself has long taken the position that "a decision without principled justification would be no judicial act at all."[60] Those rulings have heightened the perception, if not the reality, that the Justices are not just "political," but are, and have become, partisan players in the political culture wars.

Despite these developments, the Court has buried its head in the sand, with some Justices asserting that everything is fine and, alarmingly, that any attempt to hold the Court or the Justices accountable is a grave assault upon judicial independence.[61] Rather than accepting the historical reality that the Court gained power from the sense that the Justices were meaningfully accountable to the other institutions of government and the people, the current Court steadfastly maintains that judicial accountability is anathema to judicial independence.[62]

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55. *See Ohio*, 144 S. Ct. at 2058.

56. *See, e.g.*, Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666-67 (2022) (per curiam); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam).

57. *See* Stephen I. Vladeck, *The Supreme Court's (Self-Defeating) Supremacy*, 2025 SUP. CT. REV. 333, 341-55 (2026).

58. *See* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (mem.).

59. *See* VLADECK, *supra* note 54, at 13-16.

60. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992).

61. *See* NYU SCHOOL OF LAW, *25th Annual Brennan Lecture: State Courts and Social Justice*, at 23:45 (YouTube, Mar. 19, 2019), https://www.youtube.com/watch?v=rLq5O7I9t3o&t=1s [https://perma.cc/TWW3-XDN7] ("When judicial accountability turns on what side a judge is on, on whether a judge's decisions are or will be popular, that is when judicial independence is threatened.").

62. *But see* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 483 (2009) ("Those clamoring for a judiciary that acts merely as a reflex of popular will and those who would offer you the false choice between an independent and an accountable judiciary shoulder the burden of rebutting ... the long-held ideal that a judge's sole concern must be the law.").

The result is a Court that has the least public support since anyone started trying to quantify it.[63] That is more than just a statistic, though: A Court without broad public support is a Court that does not have the same capital to spend on ensuring that a dissatisfied president complies with rulings against him or enforces rulings to which he objects. Put another way, whatever the source of the Court's mounting unpopularity, the result is to deprive the Justices of a growing amount of the soft power upon which their most important—and countermajoritarian—decisions have historically depended.

As the Court's behavior, and the Court itself, has more consistently split along partisan lines, so too has public commentary about, and criticism of, the institution. Although plenty of the Court's problematic behavior cannot be traced to a specific ideology or set of partisan policy commitments, it has still become the norm for critics of the Court to be pigeonholed as disaffected Democrats who are unhappy with the results of the Justices' rulings.[64] Indeed, critics are often accused of seeking to delegitimize the Court themselves by doing nothing more than describing the Court's behavior.[65] More generally, we have become accustomed to viewing the Court through distinctly ideological lenses—where one side of the Court can do little wrong, and the other side can do nothing right.[66] Individual Justices are either heroes or villains, and individual rulings in high-profile cases are the focal point for criticism or praise of the Court's work.[67]

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63. *See* Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/ [https://perma.cc/Q5NB-HUQF].

64. *See, e.g.*, Becket Adams, *No Norms: The Second Liberals Stop Getting Their Way, They Want to Pack the Court*, THE HILL (May 4, 2026), https://thehill.com/opinion/judiciary/5859225-conservative-court-democrats-attack/ [https://perma.cc/R4GF-LCFA].

65. *See, e.g.*, Steve Vladeck, *On the Legitimacy of Legitimacy Critiques*, ONE FIRST (Sep. 26, 2024), https://www.stevevladeck.com/p/bonus-100-on-the-legitimacy-of-legitimacy [https://perma.cc/KX9H-4PHD].

66. *See* Adams, *supra* note 64.

67. *See* Jake Truscott, *Public Support for the Supreme Court Through the Lens of Political Science*, EMPIRICAL SCOTUS (Oct. 23, 2023), https://empiricalscotus.com/2023/10/23/public-support-for-the-supreme-court-through-the-lens-of-political-science/ [https://perma.cc/B6QN-V29E] ("It is difficult to assess that the Court's decisions themselves—particularly those like *Dobbs* (2022), *Bruen* (2022), and others—can explain this shift.... Alas, however, this could just as reasonably be changing. It is entirely possible that this long-held expectation is no longer the status quo.").

But the Court's eroding support is just as much of a problem for those generally supportive of the results today's Justices are reaching as it is for the Court's critics. After all, the more unpopular the Court becomes, the harder it will be for the Court to assert itself against any democratic majorities.[68] Insofar as the Court's authority depends upon broad public support, the more that the Court is perceived as undeserving of respect today, the less power the Court will have tomorrow.

Although this idea is a reality that may well make Democrats happier than Republicans in our current political moment, it is nevertheless shortsighted. Even if it is possible to create a functioning constitutional democracy without a powerful Supreme Court, our Constitution offers virtually no protection against tyrannies of the majority besides an independent and powerful judiciary.[69] If anything, the second Trump administration has driven that lesson home in spades.

The upshot is that every American should be invested in ensuring that the Supreme Court we have is the Supreme Court we need: A Court that provides Americans of all political and ideological stripes with faith that the Justices are acting judiciously, and a Court that actively participates in interbranch dialogues over the proper distribution of powers across the branches of the federal government and between the federal government and the states.

Nationwide agreement with the individual rulings of the Supreme Court may be difficult but history teaches that it is possible to have a Court widely viewed as principled, even as many Americans disagree with the specific principles it is espousing.[70] Indeed, the goal of this Essay is to persuade you—not only that this is the Supreme Court we need, but that, for a long stretch of American history, this was the Supreme Court we had.

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68. *See* Copeland, *supra* note 63.

69. *See* Vladeck, *supra* note 65 (quoting the majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which underscores the importance of a court that makes "principled decisions" that do not bend to "political pressures").

70. *See infra* Part II.

## II. THE COURT WE HAD

This story starts with the Court we had for the better part of two hundred years. That Supreme Court skillfully navigated a series of political tightropes, regularly serving as an imperfect but meaningful check on Congress, the president, and the states—while also remaining subject to, if not inviting, meaningful accountability from those actors. This is the recognizable story of *Marbury v. Madison*[71] and the 1804-05 impeachment of Justice Samuel Chase.[72] It is the recognizable story of how the Court danced its way around the Radical Republicans at the height of Reconstruction.[73] And it is the recognizable story of how the Court reacted and responded to the Election of 1936 and FDR's "court-packing" plan.[74]

But the less well-known parts of these stories are what happened *in between* these flashpoints and *out* of the limelight. Justice Chase's acquittal was followed in relatively short order by a series of subtle but significant developments demonstrating how, instead of using its legislative powers to undermine the still-Federalist-controlled Court, Congress used its powers to help facilitate the Court's continuing growth and emergence—treating the judiciary as a truly coordinate branch of government.[75] Whether out of necessity or as a reward for "good behavior," Congress started giving the Justices more of an ability to do their jobs.[76]

In 1807, for instance, Congress for the first time made the Court bigger than it had started by adding a seventh seat.[77] At the same time, it created a seventh circuit court to encompass the new states

71. *See* 5 U.S. (1 Cranch) 137, 163, 176-78, 180 (1803).

72. *See* Steve Vladeck, *The Impeachment of Justice Samuel Chase*, ONE FIRST (Dec. 12, 2022), https://www.stevevladeck.com/p/5-the-impeachment-of-justice-samuel [https://perma.cc/RDR6-T7JP].

73. *See, e.g.*, Steve Vladeck, Ex parte McCardle *and Congress's Power Over the Court's Appellate Jurisdiction*, ONE FIRST (Aug. 14, 2023), https://www.stevevladeck.com/p/40-ex-parte-mccardle-and-congresss [https://perma.cc/G76S-DDFN].

74. *See* Steve Vladeck, *The Switch in Time That Saved Nine*, ONE FIRST (Aug. 28, 2023), https://www.stevevladeck.com/p/42-the-switch-in-time-that-saved [https://perma.cc/746F-BZPK].

75. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 20-21 (1928).

76. *See id.* at 21.

77. Act of Feb. 24, 1807, ch. 106, § 5, 2 Stat. 420, 421.

of Ohio, Kentucky, and Tennessee.[78] That same year, Congress appropriated $25,000 to Benjamin Henry Latrobe, the Surveyor of Public Buildings, for reconstruction of the "North Wing" of the Capitol—a plan that had, at its centerpiece, the creation of a standalone chamber for the Supreme Court, the first permanent home that the Justices would inhabit starting in 1810.[79]

The 1807 developments were just the beginning of a longer-term trend in which Congress and the Justices entered into a regular, if informal, dialogue about the Court's operations.[80] None of the measures Congress adopted during this era were especially monumental, but that was the point. On the far side of the epic clashes of the early 1800s, the two branches entered into more of a symbiotic relationship.[81] In the 1810s, Congress gave the Court a staff and a library.[82] Congress also enacted a series of subtle but significant expansions in the cases the Supreme Court could hear, giving the Justices more to do.[83]

And because the Court was busier, in 1827, Congress moved the Court's annual sitting one month earlier (to the first Monday in January) at the Justices' request to give the full Court more time to get through its growing docket of cases before the Justices left to ride their circuits.[84] Congress would move it up to the first Monday in December in 1844; the second Monday in October in 1873; and the first Monday in October in 1916, where it remains today.[85] It may be hard to get excited about something as unexciting as the Court's calendar, but given how Congress had wielded the timing of the Court's sittings as a weapon against the Justices in 1802, the

78. *Id.* § 2, 2 Stat. at 420.

79. *See Old Supreme Court Chamber*, ARCHITECT OF THE CAPITOL, https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitol-building/senate-wing/old-supreme-court-chamber [https://perma.cc/F3XA-FGWQ].

80. *See* Timothy Huebner, *History of the U.S. Supreme Court*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY (Jane Dailey ed., Oxford Univ. Press 2018) ("Congress added a seventh justice in 1807 [and] established the Court as a co-equal branch of government.").

81. *See* FRANKFURTER & LANDIS, *supra* note 75, at 30-43.

82. Act of Mar. 2, 1812, 2 Stat. 786; *see* Judith A. Gaskell, *Supreme Service: The Court of the United States Library*, 15 TRENDS L. LIBR. MGMT. & TECH. 4, 5 (2004).

83. See FRANKFURTER & LANDIS, *supra* note 75, at 44-51.

84. *See* Steve Vladeck, *The First Monday in October*, ONE FIRST (Oct. 2, 2023), https://www.stevevladeck.com/p/47-the-first-monday-in-october [https://perma.cc/PDX4-FPP7].

85. *See id.*

fact that it was now adjusting the schedule at the Court's request, and to make the Justices' jobs easier, was a meaningful reflection of how times had changed.

But perhaps the best evidence of the extent to which the branches had come to increasingly rely upon each other involved the seemingly mundane task of reporting and distributing the Court's decisions. For the first three decades after the Founding, there was no formal mechanism for disseminating the Supreme Court's rulings.[86] The Justices tended to read their rulings from the bench, and the rulings that were published were printed by private lawyers based upon loose summaries (sometimes aided by the Justices) of the oral statements.[87] No one paid the reporters; they made money only if their books sold.[88] The result was that the vast majority of the Court's work was often difficult to access except by those who could afford to purchase the expensive private accounts of the Justices' decisions—and sometimes, it was difficult even for them.[89] This is why some of the Court's early decisions were not published at all.[90]

In 1817, Congress enacted a statute directing the Justices to appoint a Reporter of Decisions, whose job was to "print and publish" the decisions of the Court "or cause [those decisions] to be printed and published."[91] The statute required the Reporter to publish the Court's rulings within six months of their rendering and to deliver eighty copies of these decisions to the Secretary of State so they could be distributed to various government officials and the Library of Congress.[92] And in 1834, the Court committed itself to reducing all of its rulings to writing, largely to make its decisions both more publicly accessible and less dependent upon the transcription and translation skills of someone who was not a justice.[93] The Court was issuing rulings that it wanted more and more

86. *See* Craig Joyce, *'A Curious Chapter in the History of Judicature':* Wheaton v. Peters *and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325, 343-44 (2005).

87. *See id.*

88. *See id.* at 345.

89. *See id.* at 345-46.

90. *See id.* at 345.

91. Act of Mar. 3, 1817, ch. 63, 3 Stat. 376.

92. *See id.*

93. Order, Mar. 14, 1834, 33 U.S. (8 Pet.) vii (1834).

Americans to be able to read, and Congress played a central role in helping to make sure that could happen. Again, the story is not that these developments were dramatic; it is that they were not.

As this was happening in Washington, an equally important part of the story was happening less visibly in federal courthouses across the rapidly expanding country. The Justices were out in the country coming face to face with the law and politics of the jurisdictions over which they presided—shoring up public faith in the institution as much through their behavior on circuit, where they were more accessible and their rulings more immediately felt, as through their behavior back in Washington.[94] As Professor Rachel Shelden has documented, the Justices' efforts during this time period were, in every sense of the word, "political."[95] They were not aloof from the regional and national politics of the era; they were direct participants in them.[96] Justices of this era often came from (and sometimes went back to) the cabinet;[97] some were serious contenders for presidential nominations.[98] Even the first White House wedding involved the 1812 marriage of Justice Thomas Todd to Lucy Payne Washington, sister to then-First Lady Dolley Madison.[99]

Alexis de Tocqueville, famously summarizing his travels across the country in 1832 in *Democracy in America*, went out of his way to underscore this point:

> [The] power [of the Supreme Court Justices] is immense, but it is power springing from opinion. They are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it. Now, of all powers, that of opinion is the hardest to use, for it is impossible to say exactly where its limits come. Often it is as dangerous to lag behind as to outstrip it.

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94. FRANKFURTER & LANDIS, *supra* note 75, at 14, 19.

95. *See* SHELDEN, *supra* note 37.

96. *Id.*

97. *See Historical Biographies of Supreme Court Justices*, CORN. LEGAL INFO. INST., https://www.law.cornell.edu/supct/justices/histbio.html [https://perma.cc/33GH-SZDW] (explaining how Justice Thompson served in the cabinet before his appointment).

98. *See id.* (describing how Chief Justice Warren sought the Republican Party's nomination for President).

99. *See How Many Weddings Have Been Held at the White House?*, WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/questions/how-many-weddings-have-been-held-at-the-white-house [https://perma.cc/9RRE-GCKQ].

> The federal judges therefore must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws.[100]

The idea that the Justices were "statesmen" may seem incongruous through the backward-looking lens of history. But it would have been both unsurprising and uncontroversial throughout the Antebellum Era. Having successfully navigated the political maelstrom of the early 1800s, the Justices spent the next five decades participating in (and, in many cases, steering) the politics of the emerging Republic—as much when they were out riding circuit as when they were back in Washington.[101] Such behavior was not an affront to their constitutional responsibilities; it was a part of their job.[102]

And Congress responded not by continuing to attack the Court, but by working to strengthen and solidify it. More money,[103] a permanent home,[104] a permanent staff,[105] a better means of conveying its rulings to the public,[106] and a host of other modest statutory innovations (including the addition of the Court's eighth and ninth seats in 1837,[107] and a tenth in 1863[108]) all pointed in the same direction: Congress shoring up the Supreme Court in response to

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100. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 150-51 (Anchor Books ed., 1969) (1835).

101. *See* Rachel Shelden, *The Supreme Court Used to Be Openly Political. It Traded Partisanship for Power.*, WASH. POST (Sep. 25, 2020), https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html [https://perma.cc/5XWF-BR4J].

102. *Cf.* KEVIN ARLYCK, THE NATION AT SEA: THE FEDERAL COURTS AND AMERICAN SOVEREIGNTY, 1789-1825, at 2, 6-7, 11 (2025) (documenting how the Supreme Court burnished its power and reputation in admiralty and maritime cases, as Congress and the President increasingly came to rely upon the federal courts, and the Court, in particular, to peaceably resolve such thorny foreign relations disputes).

103. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

104. Act of Dec. 21, 1928, ch. 44, 45 Stat. 1066.

105. Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223.

106. 28 U.S.C. § 411.

107. Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.

108. Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

what it perceived, however loosely, as "good" behavior on the Justices' part. Thus, the Supreme Court we had was a Court whose Justices worked hard to earn the political goodwill of the other branches of government—and then reaped its benefits. That did not mean the Court got all, or even most, of its decisions "right." But it did mean that the Court as an institution steadily accrued the kind of soft power it had sought, and lacked, at the beginning of the century.

This pattern continued on the far side of the Civil War, in the radically different constitutional crucible of Reconstruction, when the Court once again walked a tightrope between asserting and preserving its institutional authority while not overstepping in ways that might have precipitated its demise. Thus, the same Court that found a way to avoid the massive constitutional questions raised in *Ex parte McCardle*[109] also drew a line in the sand in *United States v. Klein*.[110] The Court's power came from its willingness to temper its power, but only to a point.

Congress followed suit, especially at the urging of then-Chief Justice Taft, in giving the Court more control over its docket in 1925 and, a few years later, its own building, so the Court could be *physically* independent of the legislative branch and not just structurally independent.[111] That independence was not absolute, as the events of 1937 drove home.[112] But that was *because*, in so many of its most important moments (and plenty of others), the Court found a way to balance the preservation of judicial independence with the maintenance of the broad, diffuse public support that protected its independence from excessive legislative or executive incursion. As time went on, the Court grew more powerful, often because of power it had chosen not to exercise.[113] Thus, although the Court could not even muster a quorum the first time it was

109. 74 U.S. (7 Wall.) 506, 515 (1869).

110. 80 U.S. (13 Wall.) 128, 147 (1872).

111. *See* VLADECK, *supra* note 54, at 28-30.

112. *See* NCC Staff, *How FDR Lost His Brief War on the Supreme Court*, NAT'L CONST. CTR. BLOG (Feb. 5, 2024), https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2 [https://perma.cc/VUL8-MFCU].

113. *See, e.g.*, Edward S. Corwin, Marbury v. Madison *and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 543 (1914) ("[The Court] therefore took the engaging position of declining to exercise power which the Constitution withheld from it, by making the occasion an opportunity to assert a far more transcendent power.").

supposed to meet in New York City in February 1790,[114] it accumulated authority through the slow-but-steady accretion of public support—especially through its careful behavior in the handful of moments in which it was most under the gun.[115]

## III. HOW THAT COURT WAS LOST

The disappearance of the Court we had did not happen overnight. Rather, we went from a Supreme Court that was generally independent, responsible, and accountable to the Court that we have today through two very different developments in the latter decades of the twentieth century and the opening decades of the twenty-first.

That story begins, at least, with Congress, which gradually gave the Court more and more control over its own caseload—authority the Justices used and abused to aggrandize power over the other branches of government, the states, and the people.[116] Congress also gradually *stopped* pulling the other levers it had utilized throughout the Court's history to keep the Justices in line. Congress has not touched the size of the Court since 1869.[117] It got rid of circuit riding in 1911.[118] It has not changed the Court's calendar since 1916.[119] It has not been the Court's landlord since 1935.[120] It ceded control over the financial terms of the Justices' retirements in 1937.[121] It stopped using the Justices' staff's salaries as a lever in 1964.[122] And it stopped using the budget as a cudgel in the early 2000s.[123]

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114. *See* VLADECK, *supra* note 54, at 30.

115. For example, following the Court's decision in *NLRB v. Jones and Laughlin Steel Corp.* and Justice Van Devanter's retirement, public support for President Roosevelt's court-packing plan plummeted as it became obvious that "the need for radical judicial reform" no longer existed. *See* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1148-49 (1987).

116. *See* Stephen I. Vladeck, *Fixing the Supreme Court Through Its Docket*, 105 B.U. L. REV. 1607, 1631-32, 1636 (2025).

117. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

118. Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

119. Act of Sep. 6, 1916, ch. 448, § 1, 39 Stat. 726, 726.

120. *See Building History*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/buildinghistory.aspx [https://perma.cc/7AB5-N8FG].

121. Act of Mar. 1, 1937, ch. 21, 50 Stat. 24.

122. Government Employees Salary Reform Act of 1964, Pub. L. No. 88-426, 78 Stat. 400.

123. *See* Vladeck, *supra* note 30.

But this story has a heavily partisan tinge to it as well, especially as judicial appointments have increasingly prioritized ideological fidelity over professional merit and the Justices who used to exert moderating influence on their colleagues have been replaced by Justices who were nominated entirely *because* of their ideological priors.[124] Starting with the defeat (mostly from the right) of Harriet Miers's nomination in 2005,[125] but especially since Justice Kennedy retired in 2018,[126] the Court has seen its middle hollowed out, removing the internal checks that had continued to exert influence on the Court's behavior even as Congress stopped doing so.[127]

We have certainly had Justices at the extreme flanks of the ideological spectrum before. But we have never had a Justice who would publicly argue, as Justice Samuel Alito did in a July 2023 interview in the Wall Street Journal, that "[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period."[128]

Alito's quote is literally incorrect—Article III, Section 2 specifically gives Congress the power to regulate the Supreme Court's caseload, a power Congress has exercised continuously since 1789.[129] But it captures exactly what is unique about this moment—not the extremism of the Justices' substantive views, but the limitlessness of their belief in the institution's absolute independence—coming at the same time as Congress has stopped pulling any of the levers on which it relied to keep the Court loosely in line for the first two hundred years of the Republic.

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124. *See* Jessica Yarvin & Daniel Bush, *Is the Hyper-Partisan Supreme Court Confirmation Process 'The New Normal'?*, PBS NEWS (Sep. 13, 2018), https://www.pbs.org/newshour/nation/is-the-hyper-partisan-supreme-court-confirmation-process-the-new-normal [https://perma.cc/6LT5-LKYP].

125. *See* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE SUPREME COURT 264, 277, 284 (2007).

126. *See, e.g.*, CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH 204-11 (2019); RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER 55-56 (2019).

127. *See, e.g.*, Stephen I. Vladeck, *It's Neil Gorsuch's Supreme Court Now, Not Anthony Kennedy's*, POLITICO (Apr. 2, 2019), https://www.politico.com/magazine/story/2019/04/02/neil-gorsuch-supreme-court-anthony-kennedy-226469/ [https://perma.cc/P4YQ-DWA4].

128. David B. Rivkin Jr. & James Taranto, Opinion, *The Weekend Interview with Samuel Alito: The Supreme Court's Plain-Spoken Defender*, WALL ST. J., July 29-30, 2023, at A11.

129. *See* U.S. CONST. art. III, § 2, cl. 2.

The consequence is a Court that is not—and, per Alito, does not believe it ought to be—accountable to the other branches of government. Coming at the same time as the Court has handed down a seemingly limitless flood of controversial and ideologically divided rulings in high-profile cases, the result has been to accelerate the erosion of public support in the Court[130] at the exact moment when that support is so vitally necessary. The central shortcoming of the Supreme Court we have is not that it has a 6-3 Republican supermajority; it is that it is a Court that is less accountable to the other institutions of government than any of its predecessors and that appears to view this reality as a normatively desirable, if not constitutionally compelled, outcome.[131]

## IV. THE COURT WE NEED

For some, the proper response to the Court we have is to permanently weaken the Supreme Court as an institution—whether by expanding the size of the Court, taking away the Court's jurisdiction, stripping its budget, or pursuing other measures that will serve in the long term only to further reduce the Justices' real and apparent authority.[132] But recent events[133] should have settled, beyond peradventure, the importance of unelected judges in our constitutional system. Indeed, it seems undeniable that federal courts have been the most significant check on the second Trump administration during its first year-plus in office—even if many of us, myself included, have been critical of the Supreme Court's behavior in a significant subset of those cases.[134] It is difficult, if not impossible, to envision a constitutional system in which the Supreme Court has been seriously weakened but the federal courts,

130. *See* Copeland, *supra* note 63.

131. *See supra* note 15 and accompanying text.

132. *See* Steve Vladeck, *A Taxonomy for Court Reform*, ONE FIRST (Apr. 15, 2024), https://www.stevevladeck.com/p/76-a-taxonomy-for-court-reform [https://perma.cc/9RXD-7KRH].

133. *See, e.g.*, Louise Radnofsky, Mariah Timms & Jess Bravin, *Judges Continue to Block Trump Policies Following Supreme Court Ruling*, WALL ST. J. (July 28, 2025), https://www.wsj.com/us-news/law/judges-continue-to-block-trump-policies-following-supreme-court-ruling-bf20d1ef [https://perma.cc/KAS3-L9T3].

134. *See* Steve Vladeck, *The "War" on Judges*, ONE FIRST (Nov. 17, 2025), https://www.stevevladeck.com/p/193-the-war-on-judges [https://perma.cc/2S4S-SD77].

in general, are still able to meaningfully check an overzealous executive.[135]

That is why, in my view, the way to "fix" the Court we have is by restoring the modes and sources of accountability that helped to ensure that the Court's predecessors did not veer too far out of control in any one direction. A more accountable Court may not produce decisions I like, but it would, in my view, be better able to balance the hard power the Court has in individual cases with the soft power the Court gains in the aggregate through widespread (if diffuse) public support. And it is hard to imagine that a more accountable Court could do everything that the current Justices are doing, both on and off the bench. The point is not to trade tyrannies of the majority for a tyranny of unelected judges; it is that the best medicine for misbehaving branches is to strengthen the checks and balances in both directions—not to just cut one branch out of the loop.

Of course, it is easy to be fatalistic about the specter of meaningful Court reform—whether because of the very public failures of recent attempts[136] or a complete lack of faith in our contemporary Congress to do anything that smacks of even a modicum of institutional responsibility (or both). And yet, everyone—including the Justices—should support reforms designed to improve the Court's relationship with the other branches, even those who see no problem with the status quo. Some of that case rests on subtle but significant examples of contexts in which there has already been movement—including changes in how the Justices have handled matters on the shadow docket in response to public criticisms of their behavior,[137] and even the milquetoast ethics reforms reflected in the November 2023 "Code of Conduct."[138] But some of that case rests

135. *See* Radnofsky, Timms & Bravin, *supra* note 133.

136. *See, e.g.*, Justin Jouvenal & Tobi Raji, *Sweeping Bill to Overhaul Supreme Court Would Add Six Justices*, WASH. POST (Sep. 26, 2024), https://www.washingtonpost.com/politics/2024/09/26/supreme-court-reform-15-justices-wyden/ [https://perma.cc/2NQA-LH8Q].

137. *See* Steve Vladeck, *The New (and Sort-of-Improved?) Shadow Docket*, ONE FIRST (Apr. 10, 2025), https://www.stevevladeck.com/p/bonus-140-the-new-and-sort-of-improved [https://perma.cc/TYY4-JPQN].

138. *See* SUP. CT. OF THE U.S., CODE OF CONDUCT FOR JUSTICES (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/FW2J-WNAK]. Some commentators observed that the Code of Conduct deviates substantially from the Code of Conduct for other federal judges, while others have critiqued the lack of enforcement mechanism. *See* Charles Geyh, *The New SCOTUS Code*

more generally on persuading all-comers that a healthy, institutionally responsible Court is something that we will all miss when it is gone—and that we are far closer to the point of no return than folks who do not watch the Court closely might appreciate.

Everyone will have different views about the specific reforms that will do the most to make the Court more accountable; some possibilities include Congress reasserting at least a modicum of control over the Court's docket,[139] the creation of an Article III Inspector General to provide more meaningful and institutionally driven oversight of the Justices' behavior,[140] and other measures designed to make the Court and its work more accessible and responsive to broader institutional pressures.[141]

But the critical point is not that any one of these proposals is a magic bullet; it is that *any* sustained reinvestment by the democratically elected branches in oversight and control of the Court and its work will almost certainly produce salutary effects—either because the Justices will conform their behavior to the increased oversight to which they are subject, or they *will not*, and their recalcitrance will provoke ever-more-aggressive interventions from without.

The point is not just to persuade you that this is the Court that we need, but to also leave you with a healthy dose of hope tempered with a profound sense of urgency—hope that it is possible, by elevating our understanding of the historical relationship between the Court and other actors, to meaningfully move the needle on why it can and should be fixed, and urgency that we do so sooner rather than later.

We have been fortunate, in all of American history, to never have a Supreme Court decision that a president directly refused to obey.[142] But as Justice Kennedy's quote at the beginning suggests,

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*of Conduct*, SCOTUSBLOG (Nov. 24, 2023), https://www.scotusblog.com/2023/11/the-new-scotus-code-of-conduct/ [https://perma.cc/SJZ3-CPN5]; Annie Gersh & Nina Totenberg, *The Supreme Court Adopts First-Ever Code of Ethics*, NPR NEWS (Nov. 13, 2023), https://www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code [https://perma.cc/J5FB-9JVQ].

139. *See* Vladeck, *supra* note 116, at 1621-23.

140. *See* Steve Vladeck, *An Article III Inspector General*, ONE FIRST (Oct. 19, 2023), https://www.stevevladeck.com/p/bonus-49-an-article-iii-inspector [https://perma.cc/CEC7-T6TW].

141. *See* Vladeck, *supra* note 132.

142. It turns out that the famous quote attributed to President Andrew Jackson about *Worcester v. Georgia*—that "John Marshall has made his decision, now let him enforce it"—is almost certainly completely apocryphal. *See* Steve Vladeck, *What Really Happened in*

it took decades of careful stewardship for the Court to gradually accumulate the power and "trust" that it needed to hand down a ruling like *Brown* and expect it to be enforced, or a ruling like *Nixon* and expect it to be obeyed.[143]

If this Essay accomplishes nothing else, hopefully it at least convinces you that this hard-earned authority is more fickle than it might appear at first blush—and that its continuing maintenance depends upon far more than the letter of the Constitution or the *ipse dixit* of the Justices. Ultimately, there is nothing inevitable about the Supreme Court we had, the Court we have, or the Court we need. Rather, the persistence of a Court that can live up to its intended constitutional function depends upon all of us—not just to understand the institutional history of the Supreme Court of the United States, but to learn from it.

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Worcester v. Georgia, ONE FIRST (Mar. 6, 2025), https://www.stevevladeck.com/p/bonus-129-what-really-happened-in [https://perma.cc/22EY-P5RS].

143. *See Dep'ts of Com., Just., and State, the Judiciary, and Related Agencies Appropriations for 2002: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, *supra* note 1.